



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Failure of Koenecke Ford
Mercury, Inc. to Complete Required Monitoring of
the Water System Located at Koenecke Ford
Mercury, Reedsburg, Wisconsin

Case No.: 2001-SCEE-011

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 22, 2002, the Department of Natural Resources (Department) issued an Administrative Order with Penalty to Martin Koenecke, Jr., of Koenecke Ford Mercury, Inc., (Koenecke) alleging the failure to complete required monitoring of a water system. On March 25, 2002, the Department received a Petition for Hearing from Attorney Gary Antoniewicz on behalf of Koenecke, pursuant to Wis. Stat. § 281.19(3). On April 2, 2002, the Secretary of the Department granted the request for hearing and on April 8, 2002, the request for hearing was filed with the Division of Hearings and Appeals.

Pursuant to due notice, a hearing was conducted on June 27, 2002, in Reedsburg, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding. At the close of the hearing, the Department submitted proposed findings of fact, conclusions of law and order. On July 5, 2002, Koenecke filed comments on the Department's proposed findings of fact, conclusions of law and order. On July 8, 2002, the Department filed the affidavit of Pamela Kober.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Koenecke Ford Mercury, Inc., by

Attorney Gary L. Antoniewicz
1 South Pinckney Street
P. O. Box 927
Madison, WI 53701-0927

Wisconsin Department of Natural Resources, by

Attorney Judith Mills Ohm
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

The parties executed and filed a stipulation including the following facts:

1. Wisconsin Admin. Code § NR 809.04(48) defines a non-transient non-community water system as a non-community water system that regularly serves at least 25 of the same persons over six months per year. Koenecke Ford Mercury, Inc. (Koenecke) is located at S2745 Twin Pine Road, Reedsburg, Sauk County, Wisconsin, and has a non-transient non-community water system at that location.
2. Wisconsin Admin. Code § NR 809.25(2) requires that Koenecke test its water system for volatile organics (VOCs) for four consecutive quarters in each three-year compliance period. DNR records show that Koenecke performed such test for the third quarter in 2001, the second, third and fourth quarters of 1999, and the fourth quarter of 1998. No test results were submitted for any quarter of 2000, nor were test results submitted for the first, second or fourth quarters of 2001.
3. Wisconsin Admin. Code § NR 809.12(4)(a) and (c) required that Koenecke test its water system for nitrate. DNR records show that Koenecke submitted tests for nitrate for the third quarter of 2001, and the second, third and fourth quarters of 1999. No nitrate test was submitted for 2000.
4. In July 2000, the DNR issued a Notice of Violation (NOV) to Koenecke for failure to test for VOCs and nitrate for the first two quarters of 2000.
5. A second NOV for failure to sample for nitrate and VOC's for calendar year 2000 was mailed to Koenecke on March 9, 2001. The NOV also scheduled an Enforcement Conference for March 23, 2001. No representative of Koenecke attended the Enforcement Conference.
6. Wisconsin Admin. Code § NR 809.31(1)(c) requires that Koenecke test its water system quarterly for total coliform bacteria. DNR records indicate that Koenecke submitted test samples for all four quarters of 2000, and the first, third and fourth quarters of 2001. No test sample was submitted for the second quarter of 2001.
7. Wisconsin Admin. Code § NR 809.12(3) and (10) require Koenecke to test its water system for inorganic chemicals during each three-year compliance permit at a period designated by the DNR. The DNR designated 2001 for testing by Koenecke, but no tests were received. Koenecke's last tests for inorganic chemicals were in 1998.
8. Wisconsin Admin. Code § NR 809.21(2)(c) requires Koenecke to test its water system for synthetic organic contaminants at least once during each three-year compliance period. The DNR requested Koenecke to submit test results for synthetic organic contaminants in 2001 and no test results were received.

9. Wisconsin Admin. Code § NR 809.547(4)(d)(3) requires Koenecke to test its water system for lead and copper every three years. The DNR issued Koenecke a request for lead and copper test results in 2001 and no test results were submitted. Koenecke's last test for lead and copper was in 1995.

10. Pursuant to Wis. Stat. § 281.99, on January 23, 2002, the DNR issued an Administrative Order with Penalty to Koenecke imposing a \$6,000.00 forfeiture on Koenecke for alleged noncompliance and alleging a documented pattern of noncompliance with one or more rules.

11. The DNR did not provide Koenecke written notice of the alleged violation and proposed forfeiture pursuant to Wis. Stat. § 281.99(1)(b)1, prior to issuance of its Administrative Order with Penalty.

12. On March 22, 2002, Koenecke filed a verified Petition for Hearing related to the DNR's Administrative Order with Penalty and such Petition was timely filed.

13. Attached to the stipulation as Exhibit A is a page from the DNR's website identifying the Koenecke water system and the information therein is accurate.

14. Attached to the stipulation as Exhibit B are pages from the DNR's website showing sampling requirements imposed by the DNR on the Koenecke water system and the tests completed by Koenecke, and the information therein is accurate.

The following two findings of fact were submitted by the Department as proposed findings of fact and are not contested by Koenecke

15. Koenecke tested its water system for volatile organics once during 2001 (on or about July 31, 2001), pursuant to the requirements of Wisconsin Admin. Code § NR 809.25(2), but did not submit that sample to the Department until February 2002.

16. Wisconsin Admin. Code § NR 809.12(4)(c) requires that Koenecke test its water system for nitrate quarterly. Koenecke tested its water system for nitrate once during 2001 (on or about July 31, 2001), but did not submit that sample to the Department until February 2002.

DISCUSSION

The relevant facts in this case are stipulated. The provisions in the order sought by the Department are not opposed by Koenecke. The only disputed issue is the Department's request that an administrative penalty be assessed against Koenecke. Authority for the assessment of an administrative penalty is found at Wis. Stat. § 281.99(1). Wis. Stat. § 281.99(1) provides:

(a) The department may directly assess forfeitures in the amounts provided under sub. (2) for violations of safe drinking water program rules promulgated under s. 281.17 (8) or (9).

(b) 1. Subject to subd. 2., if the department proposes to assess a forfeiture for a particular violation, it shall first provide written notice of the alleged violation to the water system owner or operator. The notice shall state the amount of the proposed forfeiture, an explanation of how the amount of the proposed forfeiture was determined under sub. (2) (b) and a proposed order under par. (c). After providing the notice, the department shall attempt to negotiate with the water system owner or operator to remedy the alleged violation. If the water system owner or operator corrects the alleged violation, or if the department and the water system owner or operator reach a compliance agreement, before an order is issued under par. (c), the department may not assess a forfeiture for the alleged violation.

2. The department may directly assess a forfeiture by issuing an order under par. (c) without first providing notice if the alleged violation either creates an acute risk to public health or safety or is part of a documented pattern of noncompliance with one or more rules promulgated under s. 281.17 (8) or (9).

(c) If the department determines that a forfeiture should be assessed for a particular violation, it shall issue an order under s. 281.19 (2) (a) to the water system owner or operator alleged to have committed the violation. Except as provided in par. (b) 2., the department may not issue the order until at least 60 days after the day on which it provided notice under par. (b) 1. The order shall specify the amount of the forfeiture assessed, the violation and the rule alleged to have been violated and shall inform the licensee of the right to contest the order under sub. (3).

Wis. Stat. § 281.99(1)(b)1., allows the department to assess a forfeiture after it has first provided written notice of the alleged violation to the water system owner or operator. The Department admits it did not provide such a notice to Koenecke. Wis. Stat. § 281.99(1)(b)2., permits the Department to assess a forfeiture without first providing the required notice under Wis. Stat. § 281.99(1)(b)1., if "the alleged violation creates an acute risk of public health or safety or is part of a documented pattern of noncompliance." The Department does not allege that Koenecke's failure to perform the required testing has created an acute risk of public health or safety. Accordingly, a forfeiture can only be assessed in this matter if it is found that

Koenecke's failure to perform the required testing is "part of documented pattern of noncompliance."

Koenecke repeatedly failed to perform tests for VOCs and nitrates in its water supply system. Koenecke also failed to test for inorganic chemicals, synthetic chemicals, and lead and copper during the same time period. Koenecke did test for total coliform bacteria for all but one required time during the time period. Apparently the reason the tests for total coliform bacteria were conducted as required is because the Department sent out kits for this test to Koenecke. Koenecke only had to collect a water sample and send it to the Department. All the other required tests had to be done by private labs. Koenecke testified that he did not realize that the other required tests were not performed on the water samples he was sending to the Department. The forms sent by the Department are confusing and do not clearly specify what Koenecke needed to do to get into compliance.

Koenecke was sent a "Notice of Noncompliance" dated April 5, 2000 (Exh. 4) and "Notices of Violations" dated July 20, 2000 and March 9, 2001 (Exhs. 10 and 11). Koenecke testified that he did not realize that the notice of violations issued by the Department indicated that he had failed to complete required testing. Although the forms sent by the Department may have been confusing, the "Notice of Noncompliance" and "Notices of Violation" expressly state that Koenecke "failed to submit all required drinking water samples." Upon receipt of these notices, it is reasonable to expect that Koenecke would have contacted the Department to find out whether there had been a mistake or find out what he needed to do to come into compliance. Apparently Koenecke did make some effort to contact Department staff after he received the second "Notice of Violation." However, it was not until he received the "Order with Administrative Penalty" that Koenecke seriously paid attention to the Department's notices.

The phrase "documented pattern of noncompliance" is not interpreted in the statutes, administrative code or reported case law. The phrase "documented pattern of noncompliance" does not necessarily include an element of willful intent. Koenecke's failure to contact the Department to inquire about what he needed to do to comply with testing requirements arguably constitutes a documented pattern of noncompliance. However, the use of the phrase in the context of Wis. Stat. § 281.99(1) suggests that the legislative intent is that the noncompliance be intentional. Wis. Stat. § 281.99(1)(b)1 requires the Department to first provide written notice to the owner of a water system listing the alleged violations and informing the water system owner of its intention to assess a forfeiture. If the water system owner corrects the alleged violation, the Department is prohibited from assessing a forfeiture.

Pursuant to Wis. Stat. § 281.99(1)(b)2., the Department may assess an administrative forfeiture without prior notice if "the alleged violation creates an acute risk to public health or safety or is part of a documented pattern of noncompliance." These exceptions imply that the legislative intent was to not require prior notice of the intent to impose an administrative penalty in emergencies (an acute risk to public health or safety) or cases where the Department was dealing with a recalcitrant water system owner. The impression of Mr. Koenecke was of a businessman who considered himself too busy to try to comprehend the Department's testing requirements and notices. For the one test that was easy to have performed, the total coliform bacteria test for which the Department supplied test kits and for which water samples were sent

to the Department, Koenecke was in compliance. It is likely that if Koenecke had received the notice required under Wis. Stat. § 281.99(1)(b), he would have taken the necessary steps to comply with the other testing requirements.

The Department's proposed penalty is calculated as two times the amount saved by not performing the required testing. The penalty is calculated in this manner to eliminate any incentive an owner or operator of a private water system may have to violate the testing requirements in order to save money. Although one can not condone Koenecke's failure to make more of an effort to understand the Department's testing requirements for a private water system, the time and expense he has expended going through the enforcement process surely has sufficiently impressed upon him the lesson that he can not ignore the Department's rules and notices that he does not understand. Koenecke has agreed to take all necessary steps to comply with the testing requirements. The imposition of an administrative penalty is unnecessary to ensure future compliance.

CONCLUSIONS OF LAW

The first four of the following conclusions of law were submitted by the Department as proposed conclusions of law and are not contested by Koenecke

1. The Department has the authority under Wis. Stat. §§ 281.19(1), 281.17(8) and 280.11(1) to establish and maintain a safe drinking water program and to prescribe, publish, and enforce minimum reasonable standards and rules for methods to be pursued in obtaining pure drinking water.

2. The Safe Drinking Water rule, Wis. Admin. Code ch. NR 809 is adopted under the authority of Wis. Stat. chs. 280 and 281, and establishes minimum reasonable standards and procedures for the protection of public health, safety, and welfare in the obtaining of safe drinking water.

3. Wisconsin Admin. Code § NR 809.70 requires that public water systems shall meet applicable minimum monitoring requirements stated in Wis. Admin. Code ch. NR 809. Wisconsin Admin. Code § NR 809.70 also provides that the Department may require monitoring that exceeds the minimum monitoring requirements of any section in Wis. Admin. Code ch. NR 809, if the Department deems such an increase is necessary to protect public health, safety and welfare.

4. The Department has authority under Wis. Stat. §§ 281.19(2) and 280.13(1) to issue compliance measures to Koenecke

5. Pursuant to Wis. Stat. §§ 227.43(1)(b) and 281.99(3) the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

To ensure future compliance with all testing requirements in Wis. Admin. Code Ch. 809, Koenecke Ford Mercury, Inc., is ordered to:

1. Designate a person and a back-up person responsible for collection and submittal of required water quality samples, or contract with a professional water sampling service to collect and submit required water samples. Koenecke shall submit the name, address, and phone number of the designated persons or the water sampling service responsible for water system monitoring to Kim Kolosovsky, Department of Natural Resources, Dodgeville Service Center, 1500 North Johns Street, Dodgeville, Wisconsin, 53533-2116 within 14 days from the date of this Order. Koenecke is encouraged to allow Kim Kolosovsky to provide guidance and assistance regarding the collection and submittal of required water quality samples.
2. Post public notice in conformance with Wisconsin Admin. Code §§ NR 809.81(2)(d) and 809.81(4) by posting notices at several conspicuous locations for at least 30 days at all drinking water outlets served by the Koenecke system. Koenecke shall submit a copy of the public notice to the Department within 14 days from the date of posting/delivering the notice.
3. Within 30 days of the date of this Order, Koenecke shall sample for nitrates, total coliform bacteria, volatile organic compounds, synthetic organic compounds, inorganic compounds, lead and copper. The analytical results shall be submitted to the Department as required by Wis. Admin. Code ch. NR 809.
4. The administrative penalty imposed by the Department is reversed.

Dated at Madison, Wisconsin on August 7, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.